No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Curtis D. Wilbur, and to the Honorable Frank H. Rudkin, Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, and to the Honorable Frank H. Norcross, Judge of the District Court of the United States, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In this action the appellees sought to recover on a policy commonly known as an automobile liability policy. The named assured under this policy, Mrs. Kittredge, died and the present action concerns a judgment obtained against Hooper, a chauffeur, and an additional assured under the policy. It is the contention of the appellant that Hooper, as required

by the terms of the policy, failed to forward to the appellant forthwith after receipt thereof a copy of the summons and complaint served upon him in the action pending in the state court, and that he also failed to render to the appellant all cooperation and assistance in his power in the defense thereof.

The opinion of this court clearly sets forth the date of the various acts taken in the litigation against Mrs. Kittredge, the named assured, and Hooper, the chauffeur. As is pointed out by the opinion, before Hooper, the chauffeur, was served with process in the state court, Mrs. Kittredge had died, and the action had been ordered abated as to her by judgment. At that moment, February 11, 1927, this appellant was no longer concerned or involved with the facts of that action.

Thereafter and on March 28, 1927, for the first time, Hooper, the chauffeur, was served with a copy of a summons and complaint in an action pending in the state court. It is admitted throughout this litigation that Hooper failed to forward to the appellant a copy of the summons and complaint so served upon him. To become entitled to the benefit of this policy it was then incumbent, we contend, upon Hooper as an additional assured, for the first time to comply with the provisions of the policy, namely, "to forward to the company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the company all cooperation and assistance in his power, * * * " It is specially pleaded in the

amended answer of this appellant that Hooper failed to comply with these provisions of the policy and therefore forfeited whatever rights he might have thereunder.

The opinion states, "There was testimony tending to prove that the process and pleadings served on the co-defendant Kittredge during her lifetime were properly forwarded to the appellant, and this was a sufficient compliance with the requirements of the policy in that regard."

Mrs. Kittredge and her executor did comply with the terms of the policy, but that transaction was completely terminated before Hooper was ever served with process in the state action.

The opinion then proceeds, "While the receipt of the process and pleadings served on the co-defendant gave no notice that service had also been made upon Hooper, there was testimony tending to prove that the appellant had actual notice of the service of process on Hooper both before and after default was entered against him and was given full opportunity to defend in his behalf but refused to do so on the ground that it had a complete defense to the action."

Nowhere in the testimony in this case does it appear that the appellant ever received notice that the summons served upon Hooper was the same summons which it had received some months before on behalf of the named insured, Mrs. Kittredge, and under which proceedings had been terminated by a judgment in favor of the assured Mrs. Kittredge on a dismissal following her death.

The only testimony concerning notice comes from A. L. Crawford, one of the attorneys for the appellee. At page 83 of the transcript he testifies that three or four days after the service of summons on Hooper, he had a conversation with Gus L. Baraty, one of the attorneys for the appellant. At the time of this conversation with Mr. Baraty that attorney's connection with the case had ceased by reason of the dismissal above mentioned and any conversation had with him, therefore, we respectfully contend, was not a notice to this appellant; furthermore, there is no evidence tending to show that Mr. Baraty was a person to whom notice binding this appellant could be given.

The only other evidence concerning notice is that given by the same witness, (transcript, page 85) in a conversation had with Mr. Cresswell, claims agent of the company, which took place after the default of Hooper had been entered. And the records show that default of Hooper was not entered for a period of nearly a year from the time he was served with summons. We respectfully contend, therefore, that this appellant as required by the terms of its policy, did not forthwith, or at all, receive from Hooper or from anyone else a copy of the pleadings served upon him in the state court; that Hooper, therefore, by his failure to comply with the terms of the policy forfeited his rights thereunder and that the appellees in this case have no greater right under the policy than Hooper had himself. In other words, if this appellant by reason of Hooper's forfeiture was not obligated to pay Hooper anything appellant, in turn,

is not obligated to pay appellee who derives her right solely through Hooper. The question of delivery of process to an insurance company and cooperation on the part of the assured has been passed upon by this court in the three cases cited in the opinion. In the case of

Slavens v. Standard Accident Ins. Co., 27 F. 2nd 859,

it appeared that the summons and complaint during the pendency of the action itself had been served upon the insurance company. In the case at bar when Hooper was served with the process we respectfully contend that a new and distinct situation presented itself which required that the appellant be served with a copy of the process in response to which it is claimed it should have appeared and defended. The cited case and the case at bar are not similar as to the facts of notice of pendency of action.

In the case of

Metropolitan Cas. Ins. Co. of N. Y. v. Colthurst, 36 Fed. 2nd 559,

decided by this court January 13, 1930, the assured, Harris, had failed to deliver to the insurance company a copy of the summons and complaint served upon him. This court, at page 561, said:

> "The important consideration was that appellant (the insurance company) should be advised of the service of process so that it could appear in response thereto, in the assured's name, and make defense. * * *
>
> "In that view, admittedly, the cause of his default in not sooner forwarding the summons and complaint, Harris, in case he had satisfied

> the judgment against him, could not have recovered upon the policy, and the question is whether or not, for like reasons, appellee is subject to the same disability. The contract and the statutes provide for a suit 'under the terms' of the policy or 'subject to its terms and limitations,' and we think, in the most favorable view to the injured party, it was contemplated he would comply with such terms to the extent of his ability."

Neither Hooper nor these appellees nor their attorneys after service of process upon Hooper ever delivered the same to this appellant, as required by the terms of the policy.

In the case of

Royal Indemnity v. Morris, 37 F. 2nd 90,

decided by this court January 20, 1930, the named insured failed to deliver summons, and in fact refused to permit a defense to be made in his behalf. This court, in its opinion, stated:

> "Upon the assumption that Gomez, as we hold, was an 'insured,' it must be conceded under the facts stipulated that he violated a material condition of the policy in declining to permit any defense to be made to the action brought against him by the appellee; and, as we understand, it is not contraverted that as a result of the default, he forfeited his right to claim indemnity under the policy. * * *
>
> "It may be added that the duty of the insured in respect of permitting a defense in his name is not susceptible to precise general definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a

sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility and hence is not bound to yield to any demand which would entail violation of any law or ethical principles; that he cannot arbitrarily or unreasonably decline to assist in making any fair and legitimate defense. Here it is stipulated that he declined to permit any defense to be made in his name, and it is to be presumed that the defendant in such a case could at least legitimately challenge the amount of the alleged damage and require proof."

In the instant case, in passing it might be said, that the demand against Hooper in the state court as set forth in the complaint was very greatly reduced by the court in rendering its judgment. In the case cited (the *Morris* case) this court definitely holds that the failure of Gomez to cooperate was a violation of the policy.

Similarly, we contend that the failure of Hooper, or anyone else to deliver to the appellant a copy of the summons and complaint served upon him, and his failure after service at any time to cooperate with the appellant in the defense of the state action was a forfeiture of whatever rights he had under the policy. It must be understood that there is no attempt anywhere in this litigation to show any collusion on the part of Hooper and this appellant.

Since the printing of our opening brief in this appeal there has come to our attention a case decided by the United States Circuit Court of Appeals, from

the Fourth District, West Virginia, under date of September 19, 1930, entitled

New Jersey Fidelity etc. Company v. Love.

The case concerns recovery under a policy wherein the assured has failed to deliver copy of summons and complaint to the company.

We quote from a decision:

> "The District Court held, although process in the State court against Mrs. Watt, by the plaintiff, was not forwarded to the insurance company until more than seven months after she had received it, nevertheless, the insurance company had an opportunity to appear and defend the action in the state court and that its failure to do so, made it liable under the terms of the policy to the plaintiff."

In reversing, the Circuit Court of Appeals of the Fourth Circuit, cites with approval the cases of

Metropolitan Cas. Ins. Co. v. Colthurst, supra

and

Royal Indemnity Company v. Morris, supra.

The opinion proceeds:

> *"There is no doubt that the insurance company received prompt notice of the accident and made investigations, and no claim is made that the policy should be avoided under that clause. But the insurance company does claim that the clause requiring the assured to give notice of the accident, is separate and distinct from the clause which requires that the assured shall immediately forward process to the company at its office. The insurance company contends, first, that compliance with this clause is a condition precedent to any*

recovery under the policy, binding both upon the assured and upon Mrs. Love, the plaintiff's decedent, and must be complied with within a reasonable time after the institution of the suit, and if not so complied with, no liability attaches in any event; and secondly, that even if it is not a condition precedent, nevertheless, the insurance company was prejudiced by the failure to forward process promptly, in that it was deprived of its rights to cross-examine the plaintiff's witnesses and would be at a disadvantage in defending the suit in the State court.

*The provisions of the policy are plain and unambiguous. The policy provides that 'failure on the part of the assured to comply with any of said conditions shall forfeit the right to recover hereunder.' One of the conditions is that the assured shall immediately forward to the company at its office every summons or other process served upon her. It is obvious that this provision is of the essence of the contract, in insurance of this kind, and not merely a stipulation as to the form of bringing to the notice of the insurer the fact of loss as in policies of fire and life insurance. By the express terms of the policy, failure to comply with the conditions, forfeits the right to recovery * * * but here there was a delay of more than seven months and we think that such a delay under the circumstances was entirely unreasonable."* (Italics ours.)

In the case at bar no summons served upon Hooper was ever forwarded to appellant, and our contention is the same as set forth in the opinion of the Circuit Court of Appeals of the Fourth Circuit, namely, that the provision requiring delivery of process is of the

essence of a contract of this kind of insurance. On the "insolvency" clause in this type of insurance policy, the Court of the Fourth Circuit says:

> "The insolvency clause itself says in plain terms that the personal representative of the injured party may maintain an action 'under the terms of the policy.' If the injured party can dispense with one of the terms, she can dispense with any of them; but our view is that she must comply with its terms and conditions, and if she does not do so, she forfeits her rights under the policy, the same as the assured * * * the point is that the parties have made their contract in plain and unambiguous language, and that by the provisions of that contract, all of its terms must be complied with before there can be a recovery either by the assured or the injured party.
>
> It is argued, however, that the insurance company in this case, had an opportunity to defend the suit, and was not prejudiced by the failure to forward the process promptly * * * but the question, in our view of the case is immaterial, where, by the terms of the policy, a failure to comply is made an express cause for forfeiture, a showing of prejudice is not necessary. A compliance with the conditions of the contract within a reasonable time is indispensable to fixed liability. The condition is a material and important part of the contract, and should not be deliberately set aside as of no moment."

Similarly with the case at bar, the conditions requiring the deliver of all process served upon the assured forthwith, which of course, means within a reasonable time after service, is a material part of

this contract of insurance, in the very nature of business transactions. It must be so. Hooper admittedly never delivered this summons to the appellant. He admittedly never paid any attention to the defense of the action brought against him as is evidenced by his default therein; he thereby violated two of the material and important portions of the contract of insurance of this appellant. We believe that the appellant, under its contract of insurance, had the right to insist that Hooper, the additional assured, should deliver to it the process served upon him; the appellant likewise, we believe, had the right to insist that Hooper cooperate in the defense of that action. Hooper deliberately failed to do either, and no one ever delivered the summons and complaint served upon Hooper to this appellant, after it had been served upon him. If this appellant is to be held bound by certain alleged notices, it should be at least entitled to be served with a copy of the summons and complaint which it is expected to respond to, but nothing of the kind was done in the instant case. The connection of Mrs. Kittredge and the interest of this appellant in her defense had ceased prior to service of any process upon Hooper. The conditions mentioned in this policy, we respectfully contend, are reasonable provisions to be inserted in policies of the appellant, or any insurance company, and the numerous claims and actions of this character that are constantly being filed throughout the country should not be governed by verbal notice given to an insurance company of the pendency of an action without at least being personally served with the document that it is expected to answer and defend for an assured.

We respectfully contend, in conclusion that in the light of the decisions of this court, and the decision cited from the Fourth Circuit, and in the interest of uniformity in decisions on this type of defense under such insurance contracts, that a rehearing in this case should be granted.

Dated, San Francisco,
December 8, 1930.

Respectfully submitted,
HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellant and petitioner in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
December 8, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Counsel for Appellant and Petitioner.